NO. 15590

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE,

Appellant,

v.

E. D. McALEXANDER, Acting District Director, Immigration and Naturalization Service, Department of Justice,

Appellee.

PETITION FOR REHEARING

Appeal from the United States District Court for the District of Oregon.

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TO THE HONORABLE ALBERT LEE STEPHENS, RICHARD H. CHAMBERS and FREDERICK G. HAMLEY:

Comes now appellant, Willia Niukkanen, and respectfully petitions the above Court for a rehearing of his appeal in which an opinion affirming the judgment of the District Court was filed April 6, 1959, for the following reason and upon the following ground:

1. The Court erred in affirming the judgment of the District Court in that it failed to consider the question of whether the Act of October 16, 1918, 40 Stat. 1012, as amended by Section 22 of the Internal Security Act of 1950, now Section 1251 (a) (6) (c), Title 8, United States Code, is unconstitutional as a bill of attainder.

2. The Court erred in finding that the instant case does not fall within the rule of *Rowoldt v. Perfetto,* 355 U.S. 115.

ARGUMENT

1. Section 22 of the Internal Security Act of 1950 is an unconstitutional bill of attainder.

In the Court's opinion (p. 4) it is said:

> "The contention that the Act under which the deportation order was entered is unconstitutional as applied to Mackie is identical with a similar contention made on the previous appeal. It was there disposed of adversely to Mackie and will not be re-examined at this time."

It is true that in the previous appeal the constitutionality of the Act was questioned but the record is clear that the Court refused to consider this question on the ground that the issues had been foreclosed by *Galvan v. Press,* 347 U.S. 522, and *Harisiades v. Shaughnessy,* 342 U.S. 580.

In fact, as the Petition for Rehearing in the previous appeal indicates, the Court upon oral argument gave notice to counsel that it would not consider any constitutional arguments.

Nowhere in the decision of the Court on the previous appeal was there any discussion of the constitutional issues. It is fair to say therefore that while the constitutional issues were raised in the previous appeal, they were never actually passed upon the Court or decided by it.

We are aware that *Galvan* and *Harisiades* purport to overrule the constitutional objections of appellant except insofar as they relate to the issue of whether the Act is a bill of attainder.

The question of whether the Act is a bill of attainder was never discussed or decided in *Galvan* or *Harisiades,* or in any case in the Supreme Court since.

We believe that the constitutional issues as they apply to a deportation order affecting a man who has lived virtually all of his life in this country, since the age of nine months, and who speaks no Finnish, but only English, should be carefully considered by the Court at some point in his litigation. Up to now, no Court has in fact directly ruled on this constitutional point.

In the recent case of *United States v. Lovett,* 328 U.S. 303, the Supreme Court clarified its definition of a bill of attainder. It said:

> "They (*Cummings* and *Garland* cases) stand for the proposition that the legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial are bills of attainder prohibited by the constitution." (327 U.S. at 305.)

Section 1251 (a) (6) (c) possesses all of the attributes of a bill of attainder. It outlaws by legislative fiat the individuals of a named and ascertainable group and inflicts punishment upon them without judicial trial.

It is clear that the constitutional injunction against bills of attainder applies alike to aliens and citizens. The Supreme Court has repeatedly declared that an alien lawfully here is entitled to the same constitutional safeguards to protect his life, liberty, and property as a citizen. *Lem Moon Sing v. U.S.,* 158 U.S. 538, 547; *Wong Wing v. U.S.,* 163 U.S. 228, 238; *Yick Wo v. Hopkins,* 118 U.S. 356, 369.

There is no merit in the contention that the Act is constitutional because deportation does not constitute criminal punishment. The fact that deportation inflicts literal punishment has been affirmed by the courts repeatedly. *Bridges v. Wixon,* 326 U.S. 135, 154; *U.S. Ex Rel Klonis v. Davis,* 13 F. 2d 630 (CA 2, 1926); *Ng Fung Ho v. White,* 259 U.S. 276, 284. The cases also hold that legislation imposing no criminal punishment whatsoever can be unconstitutional as a bill of attainder solely because it deprives individuals of various rights, privileges and salaries. *U.S. v. Lovett,* 328 U.S. 303; *Ex Parte Garland,* 4 Wall. 333, 337; *Pierce v. Carskadon,* 83 U.S. 234; *Cummings v. Missouri,* 4 Wall 277.

The fact that there have been few cases in the United States' judicial history declaring legislative acts unconstitutional for being bills of attainder demonstrate that the doctrine has had deep and widespread accep-

tance by legislative and executive branches of our government.

We submit that the legislation which we here challenge falls squarely within the time honored principle condemning bills of attainder. We urge this Court to reconsider this case and uphold this bulwark of human freedom by declaring this portion of the Act unconstitutional.

2. Without repeating his argument, appellant reaffirms his position that the evidence in his case does not justify deportation under *Rowoldt v. Perfetto,* supra.

CONCLUSION

For the foregoing reasons we respectfully urge the Court to grant a rehearing of this case. We also suggest to the Court the possibility that such a rehearing be held *en banc* on account of the serious constitutional question raised by it.

Respectfully submitted,

NELS PETERSON and
GERALD H. ROBINSON,
Counsel for Appellant.